United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

77-4070

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARCELLO JOAQUIN CASTRO-CACERES,

Petitioner,

- against -

Docket No.77-4070

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

PETITION TO REVIEW
A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

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UNITED STATES COURT OF APPEALS
FILED
APR 18 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

MARCELLO JOAQUIN CASTRO-CACERES,

Petitioner,

Docket No.77-4070

-v-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

STATEMENT OF THE ISSUE
PRESENTED FOR REVIEW

WHETHER RESPONDENT'S DENIAL OF WITHHOLDING OF DEPORTATION WAS ARBITRARY AND AN ABUSE OF DISCRETION?

STATEMENT OF THE CASE

This petition has been brought to review a determination of the Immigration and Naturalization Service. Jurisdiction of this Court is invoked under 8 U.S.C. 1105(a).

On July 19, 1976, an Immigration Judge, following a denial of petitioner's application for a temporary withholding

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of deportation pursuant to 8 U.S.C. 1253(h), entered an order of deportation with a provision for voluntary departure against Petitioner in this case.

The order of the Immigration Judge was affirmed by decision of the Board of Immigration Appeals dated January 25, 1977. The instant petition for review was filed with this Court on March 15, 1977.

STATEMENT OF FACTS

Petitioner, Marcelo Joaquin Castro-Caceres, is a native and citizen of the Chile. He entered the United States as a non-immigrant crewman and was authorized to stay for a period not to exceed twenty-nine days.

As a result of the fact that he overstayed his authority to remain in this country, Mr. Castro-Caceres became the subject of deportation proceedings pursuant to 8 U.S.C. 1251(a)(2). An Order to Show Cause was issued by respondent, Immigration and Naturalization Service, (hereinafter, 'INS'), and was duly served upon Petitioner.

Subsequently, Petitioner applied to the District Director of the Service for a grant of political asylum.

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His request for asylum was forwarded by the District Director, in a letter dated May 14, 1976 to the Department of State's Office of Refugee and Migration Affairs.

In a letter dated July 6, 1976, the Office of Refugee and Migration Affairs, acting solely on the information provided by the office of the District Director and without providing for petitioner's participation in its administrative determination, denied his application for asylum in the United States.

Thereafter, a hearing was held before an Immigration Judge in the matter of Mr. Castro-Caceres' deportation at the District Office of INS in New York, New York.

At that time, Mr. Castro-Caceres submitted a request for a temporary withholding of deportation pursuant to 8 U.S.C. 1253(h), on the grounds that he would be subject to persecution in Chile because of his political beliefs.

In order to establish his eligibility for relief under 8 U.S.C. 1253(h), Mr. Castro-Caceres gave sworn testimony and submitted a sworn statement in regard to the present persecution of politically active persons in Chile

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and as to his fear of persecution should he be deported to that country.

The Immigration Judge denied petitioner's request for a withholding of deportation even although substantial evidence was adduced on the issue of persecution.

The Board of Immigration Appeals affirmed the decision of the Immigration Judge on January 25, 1977.

It is from the denial of relief under 8 U.S.C. 1253(h) and other arbitrary acts of respondent that this petition for review has been brought.

ARGUMENT

POINT I

RESPONDENT'S DENIAL OF PETITIONER'S APPLICATION FOR WITHHOLDING OF DEPORTATION WAS ARBITRARY

The relevant statute, Section 243(h) of the Immigration and Nationality Act, as amended, (8 U.S.C. 1253(h)) provides that :

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

In the instant case it is submitted that the Petitioner has presented ample evidence to sustain a finding of persecution under the statute.

The case law and administrative precedent has established a standard for 243(h) relief which requires a showing that the individual will be singled out by the authorities in his home country and thereby suffer persecution on account

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of race, religion or political belief.

Cheng Fai Fu -v- Immigration and Naturalization Service, 386F.2d 750 (2d Cir. 1967), cert. denied 390 U.S. 1003; Matter of Dunar, Interim Decision 2192 (BIA, 1973).

It is respectfully submitted that Mr. Castro-Caceres has established a "well-founded fear" that his life would be in danger and that he would be persecuted should he be forced to return to Chile.

The excesses of the Chilean Military junta have been widely publicised throughout the United States and Mr. Castro-Caceres, in his sworn testimony taken in deportation proceedings stated that individuals from all political parties opposing the ruling junta have disappeared, are being hunted, or are being held in the government's concentration camps. (TR.22,23)

Further, it is to be noted that Mr. Castro-Caceres testified that he was actively engaged in political campaigning and made public appearances as a Speaker for the opposition Liberal Party which has since been outlawed by the ruling junta (TR.20,21,23).

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Mr. Castro-Caceres was not merely an arm-chair member of an opposition political group, but a highly visible activist.

Notwithstanding this fact, the Immigration Judge found that Mr. Castro-Caceres would not be singled out and that he only spoke out against the government for a period of one year (Opinion of IJ at 2). This conclusion is clearly without support in the record wherein it shows that Castro-Caceres testified to the fact of his nearly two years of involvement in oppositionist political activities.(TR.21)

Finally, on the issue of Mr. Castro-Caceres' inability to produce further documentary information concerning his being singled out for persecution it is to be noted that as in many cases of this nature, the press, as well as the individual's relatives in the country in which totalitarian regimes are in power, are reluctant or forbidden to write or speak about the persecution going on in those countries. There always exists the very real danger of retaliation against friends and family by the local government wherever such relations seek to communicate the excesses of the group in power to the outside world.

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On the basis of the foregoing it is submitted that the decision of the Respondent denying Petitioner relief under Section 243(h) of the Immigration and Nationality Act, as amended, was arbitrary and contrary to the evidence adduced in deportation proceedings below : See Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966).

CONCLUSION

WHEREFORE, petitioner prays that his application for withholding of deportation pursuant to 8 U.S.C. 1253(h) be granted.

Respectfully submitted,

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Dated: April 18, 1977
New York, New York

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 1977, I personally served two copies of Petitioner's Brief and Appendix upon Thomas Cahill, Esq., the United States Attorney for the Southern District of New York, at his Office located at 1 St. Andrews Plaza, New York, New York.

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